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The Anthropocentric Theory Of International Law As A Basis For Human Rights

by S. Prakash Sinha*

The purpose of Professor Sinha's article is to take notice of human rights activity and to provide a basis for it in our times in the anthropocentric theory of international law. He first points out the requirements which a theory justifying human rights must satisfy, and then examines proposed theories and their inadequacies. Finally, the author outlines his own anthropocentric theory.

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I. THE HUMAN RIGHTS ACTIVITY

EFFORTS TO MAKE the anthropocentric conditions of man's physical and moral existence secure from privation by the powerful, be it an organ of the state or any other dominant segment of the society, has produced an agonizing history since the advent of man in society. The job, unfinished, continues to occupy men both of ideas and of action. In recent history the concept of human rights has offered its own particularity as one means of approaching this struggle. The ideal of human rights has sometimes found its place in positive law, although not always with full measure of juridical success.¹

Human rights activity has proceeded nationally through municipal legislation and internationally through treaties. The two approaches seem to be converging in our times.² Most dramatically, the members of the United Nations joined voices in 1948 in declaring that they shall "by progressive measures, national and international, . . . secure their [the human rights] universal and effective recognition and observance,"³ even though the rights enumerated in the Declaration are as culturally non-universal as non-distinction on the basis of religion⁴ and marriage "only with the free and full consent of the intending

(Illinois, 1964); J.S.D. (Illinois, 1966); Barrister-at-Law (Osgoode Hall); Member, Columbia University Peace Seminar. I dedicate this article to John Hazard, the beloved Chairman of the Peace Seminar.

¹ See, e.g., S.P. SINHA, ASYLUM AND INTERNATIONAL LAW ch. 5 (1971); Sinha, *An Anthropocentric View of Asylum in International Law*, 10 COLUM. J. TRANSNAT'L L. 78 (1971).

² I am in agreement here with Professor Verzijl in reading the history of human rights in this way, but I do not believe, as he does, that this has come about "either as the result of express undertakings to bring the rules of municipal law into harmony with accepted international standards or simply by the fact of the basic subordination of municipal to international law." J. VERZIJL, HUMAN RIGHTS IN HISTORICAL PERSPECTIVE 6 (1958). The reason seems to be not in some axiological pre-eminence of international law in the contemporary world but rather in an interdependence among states and an interlocking of their interests to a degree which has not existed in previous epochs.

³ Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948).

⁴ *Id.* art. 2(1). Islamic law makes a distinction based upon religion for a variety of legal purposes, although the practice would be unconstitutional in several Muslim states today. See Ahmed, *Islamic Civilization and Human Rights*, 12 REVUE ÉGYPTIENNE DE DROIT INTERNATIONAL 1 (1956); M. KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 175-201 (1955); Mujeeb, *Orthodoxy and the Orthodox: The Shariah as Law*, 38 ISLAMIC CULTURE 39 (1964); Nawaz, *The Doctrine of "Jihad" in Islamic Legal Theory and Practice*, 8 INDIAN Y.B. INT'L. AFF 32 (1959); Nawaz, *The Concept of Human Rights in Islamic Law*, 11 HOW. L.J. 325 (1965).

spouses,"⁵ as ideologically non-universal as the ownership of private property,⁶ and as politically non-universal as "periodic and genuine elections."⁷ The Declaration adopted by the United Nations General Assembly has no legally binding effect,⁸ but the importance of the proclamation of the ideal is not diminished thereby.⁹ There has, of course, been human rights activity preceding this Declaration as well as subsequent to it.¹⁰ Hints for the protection of man can be found in the Babylonian laws (in the reigns of Urukagina of Lagash, 3260 B.C., Sargon of Akkad, 2300 B.C., Ur-Nammu of Ur, 2100 B.C., Lipit-Ishtar of Isin, 1930 B.C., and Hammurabi of Babylon, 1792-1750

⁵ Declaration of Human Rights, *supra* note 3, art. 16(2). Arranged marriages are the norm in certain societies, *e.g.*, in India.

⁶ *Id.* art. 17(1). Communist ideology does not admit of private property, except in consumer goods.

⁷ *Id.* art. 21(3). Monarchies, dictatorships, single-party rules, and single-candidate elections are not non-existent.

⁸ See Sloan, *The Binding Force of a "Recommendation" of the General Assembly of the United Nations*, 25 BRIT. Y.B. INT'L L 1 (1948). On the question of whether the practice of states within international organizations creates rules of customary international law, see Sinha, *Identifying a Principle of International Law Today*, [1973] CAN. Y.B. INT'L L. 106, 116-120. The Charter of the United Nations, a binding treaty under international law, contains provisions with respect to human rights, particularly in the preamble and in articles 55, 56, 76, 13, 62, and 68, but the obligatory character of these provisions has been a source of controversy, some scholars denying it (*e.g.*, H. KELSEN, *THE LAW OF THE UNITED NATIONS* 29 (1950)), some arguing for it (*e.g.*, H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 150 (1950)). For an assessment of the legal value of these provisions, see Sinha, *Has Self-determination Become a Principle of International Law Today?*, 14 INDIAN J. INT'L L. 332, 333-37 (1974); Sinha, *Self-determination in International Law and Its Applicability to the Baltic Peoples*, in RES BALTICA 256, 263-65 (A. Sprudz & A. Ruisis eds. 1968).

⁹ Lauterpacht, *The Universal Declaration of Human Rights*, 25 BRIT. Y.B. INT'L L. 354 (1948).

¹⁰ For a history of human rights, see F. VAN ASBECK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND ITS PREDECESSORS* (1949); Z. CHAFEE, *DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS* (1951); CH. DE VISSCHER, *THÉORIES ET RÉALITÉS EN DROIT INTERNATIONAL PUBLIC* 158-65 (1955); J. VERZIJJ, *supra* note 2; Rommen, *Vers l'internationalization des droits de l'homme*, 1 JUSTICE DANS LE MONDE 163 (1959); Hamburger, *Droits de l'homme et relations internationales*, 97 RECUEIL DES COURS 293, 303 (1959); Mirkin-Guetzevitch, *Quelques problèmes de la mise en oeuvre de la déclaration universelle des droits de l'homme*, 83 RECUEIL DES COURS 255, 268 (1953); Premier, *Introduction to A. VERDOODT, NAISSANCE ET SIGNIFICATION DE LA DECLARATION UNIVERSELLE DES DROITS DE L'HOMME* (n.d., possibly 1964); P. DROST, *HUMAN RIGHTS AS LEGAL RIGHTS* ch. 1 (1951); H. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* (1972); Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 75 (M. Bos ed. 1973).

B.C.)¹¹ as well as in the Assyrian laws (those inscribed on the nine clay tablets in the reign of Tiglath-pileser I, 1115-1077 B.C.)¹² and in the Hittite laws (especially those ascribed to the reign of King Telepinus, 1511-1486 B.C.).¹³ The *Dharma* of ancient India (Vedic Period: 1500 B.C. - 500 B.C.),¹⁴ and the jurisprudence of Lāo-Tsze (b. 604 B.C.)¹⁵ and Confucius (550 or 551 B.C. - 478 B.C.)¹⁶ in ancient China contained laws for the protection of human rights. Citizens of the city-states of ancient Greece enjoyed *isogoria* (equal freedom of speech), *isonomia* (equality before the law), *jus suffragii* (the right to vote), *jus honorum* (the right to be elected to public office), *jus commercii* (the right to trade), and *jus actionis* (the right of access to justice). The Roman Law provided similar rights to the Romans under *jus civile*, and even extended certain rights to non-Romans under *jus gentium*.

In recent times, the significant landmarks in the protection of human rights include the Great Charter of the Liberties of England or the Magna Carta (1215),¹⁷ *Statutem de tallagio non concedendo* (1297),¹⁸ the Petition of Rights (1628),¹⁹ the Instrument of Government (1653),²⁰ the Habeas Corpus Act (1679),²¹ the Bill of Rights (1689),²²

¹¹ For a collection of these laws, see G. DRIVER & J. MILES, *THE BABYLONIAN LAWS* (rev. ed. 1968).

¹² For a collection of these laws, see G. DRIVER & J. MILES, *THE ASSYRIAN LAWS* (1935).

¹³ For a collection of these laws, see E. NEUFELD, *THE HITTITE LAWS* (1951).

¹⁴ A. BASHAM, *THE WONDER THAT WAS INDIA* (3d rev. ed. 1968); 1 P. KANE, *HISTORY OF DHARMASTRA: ANCIENT AND MEDIEVAL RELIGIOUS AND CIVIL LAW* (2d ed. 1968); *INSTITUTES OF HINDU LAW; OR, THE ORDINANCES OF MANU* (W. Jones trans. 1869).

¹⁵ A. WALEY, *THE WAY AND ITS POWER, A STUDY OF THE TAO TE CHING* (1934).

¹⁶ *THE ANALECTS OF CONFUCIUS* (A. Waley trans. 1938).

¹⁷ Lacking money, King John had been forced to cede his kingdom to the Pope in 1213 and to receive it back as a fief. Thereafter he was defeated by the King of France near Bouvines in 1214 and this charter was imposed on him by the prelates, earls, and barons of his realm on the meadows of Runnymede near Staines (Surrey).

¹⁸ Edward I gave this statute to the English people. He also convoked representatives of towns and counties to the Parliament.

¹⁹ Parliament presented this petition to Charles I, who sanctioned it on 7 June 1628. The King was subsequently tried and beheaded.

²⁰ This instrument gave supreme authority to Oliver Cromwell as Lord Protector of the Commonwealth of England, Scotland, and Ireland.

²¹ Enacted by Charles II on 26 May 1679, this was officially titled *An Act for the Better Securing the Liberty of the Subject, and for Prevention of Imprisonment Beyond the Seas*.

²² Officially titled *An Act for Declaring the Rights and Liberties of the Subject, and for Settling the Succession of the Crown*, this was enacted 16 December 1689 on

the Declaration of Rights, Virginia (12 June 1776),²³ the Declaration of Independence of the Thirteen United States of America (4 July 1776), the Constitution of the United States (17 September 1787) with Amendments of 1789, 1865, 1869, and 1919, and the *Déclaration des Droits de l'Homme et du Citoyen* (26 August 1789).²⁴ Human rights provisions have since this *Déclaration* been included in the constitutions adopted in Western Europe,²⁵ Eastern Europe,²⁶ the Soviet Union,²⁷ Asia,²⁸ and other parts of the world.

On the plane of international law, the Treaty of Augsburg (1555) among the Christian European states provided for the freedom of religion. The treaty between the Holy Roman Empire and Sweden under the Peace Settlement of Westphalia (1648) guaranteed some religious freedom to Christian creeds. The Treaty of Oliva (1660) between Sweden, Poland, and Russia and the Treaties of Nymegen (1678) and Ryswyck (1697) between France and Holland protected religious freedom in the ceded territories. The Treaty of Kutchuk Kainardji (1774) between Turkey and Russia protected Christian minorities in Turkey. The Final Act of the Congress of Vienna (9 June 1815) recognized minority rights for the Polish population in various countries. The Act on the Federal Constitution of Germany (signed on 8 June 1815 and annexed to the First Act) protected the religious and civil rights of Jews in the new German Federation. The Treaty of Vienna (31 May 1815) among the Netherlands, England, Russia, Austria, and Prussia provided similar protection in the union between Belgium

the occasion of the accession to the throne of William of Orange and Mary Stuart after the fall of James II.

²³ This declaration was preceded by the Plantation Covenants, such as the Fundamental Orders of Connecticut (1638), but these granted no human rights other than freedom of religion.

²⁴ Lafayette, who had supported the cause of the American colonies for independence, introduced this declaration in the French *Assemblée Constituante* in July 1789.

²⁵ For example, the Belgian Constitution of 1831, the French Constitution of 1946, and the Constitution of the Federal Republic of Germany of 1949. See J. VERZIJL, *supra* note 2, at 59-71.

²⁶ For example, the Constitution of the Czechoslovak Socialist Republic of 1960, and the Constitution of the Socialist Federal Republic of Yugoslavia. See Peselj, *Recent Codification of Human Rights in Socialist Constitutions*, 11 HOW. L.J. 342 (1965).

²⁷ See Berman, *Human Rights in the Soviet Union*, 11 HOW. L.J. 333 (1965).

²⁸ For example, India. See George, *Human Rights in India*, 11 HOW. L.J. 291 (1965).

and Holland. The Treaty of Paris (1856) provided certain protection to the populations of Walachia, Moldavia, and Serbia following the Crimean War. The Geneva Convention (1864) provided for the relief of sick and wounded soldiers and prisoners of war. The Treaty of Berlin (1878) provided for freedom of religion and juridical equality. The General Act of the Berlin Conference on Central Africa (1885) forbade slave trade, and the Brussels Conference (1889) agreed on measures to suppress it. The Treaty of Paris (1889) ceding Puerto Rico and the Philippines from Spain to the United States provided for the protection of minorities. The Hague Conventions (1899 and 1907) provided for the protection of the wounded, prisoners, and civil populations in war. The Second Berne Conference (1906) opened for signature the International Convention Respecting the Prohibition of Night Work for Women in Industrial Employment and the International Convention Respecting the Prohibition of the Use of White (Yellow) Phosphorus in the Manufacture of Matches. The Polish Minorities Treaty, signed along with the German Peace Treaty at Versailles (1919), the Minorities Treaties signed by Czechoslovakia, Yugoslavia, Rumania, and Greece (1919 and 1920), and the Peace Treaties of St. Germain, Neuilly, and Trianon (1919) and of Lausanne (1923), provided for the protection of minorities. The General Convention of Upper Silesia between Germany and Poland (1922) went so far as to grant individual members of a protected minority the right to petition an international organ. The Covenant of the League of Nations (1919) contained provisions protecting the rights of inhabitants of the colonies and territories under the control of the member states.²⁹ The Mandates System of the League, substituted by the trusteeship system of the United Nations, provided for the protection of certain racial, religious, and linguistic minorities. The International Labor Organization also has adopted various labor conventions. The Charter of the United Nations (1945) contains human rights provisions.³⁰ Certain of its organs, namely, the General Assembly, the International Court of Justice, the Trusteeship Council, the Economic and Social Council, along with the Commission on Human Rights³¹ (which the

²⁹ LEAGUE OF NATIONS COVENANT arts. 1(3), 13(1), 55(a)(c), 59, 61 (1)(2), 68, 76(c).

³⁰ U.N. CHARTER arts. 22 and 23.

³¹ Originally, this Commission was to have three subcommissions: one on freedom of information and the press, one on the prevention of discrimination and the protection of minorities, and one on the status of women. The Subcommission on the Status of Women soon became a full commission reporting directly to the Economic

Council created by virtue of Article 68 of the Charter), and the Security Council are concerned with human rights. The Universal Declaration of Human Rights was adopted in 1948. The Covenant on Civil and Political Rights and the Covenant on Economic, Social, and Cultural Rights were opened for signature in 1966, and have come into force only recently.

There are also many multilateral treaties dealing with specific rights and groups of rights which are in force.³² Regionally, the European *Convention de sauvegarde des droits de l'homme et des libertés fondamentales* (Convention for the Protection of Human Rights and Fundamental Freedoms) was adopted in 1950, creating by virtue of Article 19 the European Commission of Human Rights and the European Court of Human Rights. The American Convention on Human Rights was approved in 1969, although it has not yet entered into force. The Arab League created a Permanent Arab Commission on Human Rights in 1968. There have been proposals for the creation of an African Commission on Human Rights. There is a human rights provision in the Helsinki Agreement (1975) between the United States and the Soviet Union. Thus, human rights activity has been a concern of states on both national and international planes.

The human rights movement is in need of a theory which would provide it with an adequate basis of support. In order to provide this support, that theory must satisfy certain requirements.

II REQUIREMENTS OF AN ADEQUATE THEORY OF HUMAN RIGHTS

An adequate theory must furnish a compelling justification for human rights. It must provide a principle for both the protection of the individual and the positive fulfillment of his needs. The theory must account for the historicity of these rights, and must enable an order of priority to operate upon any catalog of such rights. It must allow for revision of these rights. It must accommodate cultural and ideological relativity. And, finally, it must accommodate the variables of economic capacity and technological capability.

and Social Council. The Subcommittee on Freedom of Information and of the Press was terminated in 1951. Only the Subcommittee on the Prevention of Discrimination and the Protection of Minorities survives.

³² See, e.g., HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS, U.N. Doc. ST/HR/1 (1973).

A. *Compelling Justification*

The theory must provide a justification for human rights which is compelling. It is not enough to ground these rights in exhortations. Nor is it enough to ground them in condemnations for failure to achieve them. Rather, a basis must be sought that points up the necessity for realizing these rights.

B. *Protection of the Individual as Well as Fulfillment of His Needs*

Since its inception, the notion of human rights has grown from providing protection to the individual from the excesses of the organs of the state to providing positive conditions for the fulfillment of his needs and the realization of his personality. The juridical recognition of human rights in both these aspects is necessary in order to furnish a principle of legitimization: in the first aspect, to secure recognition from the state of the individual's security against its power and to provide institutional machinery to effectuate that security; in the second aspect, to formulate demands toward realization of his values and to mobilize the state's resources and to harness its institutional machinery toward fulfillment of those demands. Juridicalization of human rights is necessary because without it, the citizen merely would be appealing to moral principles and public opinion while seeking protection from the state against the excesses of state power, rather than invoking a common reference between him and the state. Similarly, while seeking fulfillment of his needs from the state, he would be using terms which are non-reciprocal and irrelevant since there would be no common reference to invoke. It would, of course, be naive to conclude from this that the juridicalization of human rights would eliminate the conflict between the citizen and the state or that the conflict would cease to have purpose. The conflict, however, would now be located in a juridically cognizable field. An adequate theory of human rights must clarify this field in both the above-mentioned aspects.

C. *Historicity*

From an anthropocentric point of view, human rights are fundamental in nature and ontological in character. They are fundamental because they are essential to man's fulfillment as a social being. They are ontological in character because they have an essential structure. They relate to man in his historicity, upon the conception that the essential structure of man is not that which transcends subjection to time, but rather that which gives him historicity, makes his advent

in the world historical, views him not as a passive incident in the unfolding of his transhistoric impersonal essence but as a personal being whose active dynamism makes history. Both the positivist philosophy of law and the traditional natural law philosophy fail to take account of this relationship between the historicity of man and his human rights. Legal positivism reduces law to a matter of commands,³³ rules,³⁴ or norms.³⁵ It thereby puts the problem outside the historical context. And, since the positivist system is self-sufficient, as a model of commands, rules, or norms, there is no room in it for the fundamental rights of man.³⁶ The traditional doctrine of natural law gives a permanently valid formulation to the essential structure of man and sets up permanently valid standards of human conduct. Thus, the doctrine fails to take into account the historicity of man or the historical character of his nature. An adequate theory of human rights must not ignore the historicity of man.

D. *Order of Priority*

Human needs are various. Moreover, they are experienced with varying intensity. Since these needs make a claim on the resources of the state, both material and institutional, and since it is in the nature of resources that they are available only in finitude at a particular point in time, fulfillment of these needs has to be approached with an order of priority. Human rights, which represent these needs in both of their aspects discussed above, correspondingly must be based upon a theory which allows for an order of priority to operate upon any catalog of such rights.

E. *Revisability*

Not only must the theory provide for the order of priority among various human rights, it must also enable the revisability of such rights

³³ J. AUSTIN (1790-1859), *THE PROVINCE OF JURISPRUDENCE DETERMINED, AND THE USES OF THE STUDY OF JURISPRUDENCE; WITH AN INTRODUCTION BY H.L.A. HART* 1-2, 9-33, 37-38, 42-43, 59, 193-95, 202-05 (1968).

³⁴ H. HART, *THE CONCEPT OF LAW* 89-96 (1967).

³⁵ H. KELSEN (1881-1973), *GENERAL THEORY OF LAW AND STATE* 3-6, 15-49, 110-23 (A. Wedberg trans. 1949).

³⁶ Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593 (1958). Comparable conclusions can be derived from the earlier positivist philosophies of law: Kautilya (India, 4th century B.C.) in *THE KAUTILIYA'S ARTHA-SĀSTRA*, pt. II, 6-12 (P. Kangle trans. 1963); Shang Iang (China, d. 338 B.C.), in J. WU, *JURIDICAL ESSAYS AND STUDIES* 216-18 (1928); Shuen Tao (China, contemporary of Shang Iang), *id.* at 218.

in consonance with either a shift in needs or an emergence of new needs in the historic experience of man. For, epistemologically, our concepts gain meaning only in the context of human knowledge³⁷ and since the context changes, our specific concepts of human rights must be allowed to be revised and thus be enriched by the changed context.³⁸ For example, protection of privacy did not figure in the catalog of human rights contained in the 1948 Universal Declaration of Human Rights. Today, however, it has acquired significant meaning in the context of sophisticated technology which the state has since acquired to invade the privacy of the individual and the use to which this technology has been put, so that privacy figures prominently in the current discussion of human rights.

F. *Cultural Relativity*

Originally, the word "culture," derived from the Latin *cultura*, meaning cultivating the soil, meant cultivation of the mind. Between the late eighteenth and the late nineteenth centuries the concept of culture developed in European thought to mean either a general state or habit of the mind related to the idea of perfection, or a general state of intellectual and moral development in a society as a whole, or the general body of the arts and intellectual work, or finally, the whole way of life (material, intellectual, and spiritual) of a given society. This, in part, was a result of the growing knowledge by the Europeans of the non-European civilizations of India, Persia, and China which, although dismissed by many Europeans as backward societies, were regarded by some as distinctive shapings of the human mind which could not be comprehended in any unilinear concept of civilization. The consequent intellectual tension produced three different meanings of culture: 1) culture as denoting a process that should be a universal idea in an embodiment of universal and absolute values; 2) culture as indicating the different ways in which men find meaning and value in their lives and conceive of their notion of perfection; and 3) culture as pointing to a body of actual artistic and intellectual work.³⁹

³⁷ A. RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY (1967).

³⁸ As Machan says, "[W]e must get away from the idea that only that will count as a viable and defensible notion of something which gives us a *timeless* snapshot picture of it which cannot *ever* be revised." Machan, *A Rationale for Human Rights*, 52 PERSONALIST 216, 225 (1971).

³⁹See in this connection, M. ARNOLD, CULTURE AND ANARCHY (1869); D. BIDNEY, THEORETICAL ANTHROPOLOGY (1953); T.S. ELIOT, NOTES TOWARDS THE DEFINITION OF CULTURE (1949); A. KROEBER, THE NATURE OF CULTURE (1952); A.

There are irreconcilable differences in viewing culture as an embodiment of universal and absolute values, in viewing it as a social concept, and in viewing it as an artistic and intellectual classification. Since these differences represent important differences in viewpoint and belief, one cannot pick one concept as the proper meaning of culture and condemn the rest without being dogmatic. A human rights enthusiast, and I count myself as one, might opt for the idealist concept of culture (that culture is a universal idea embodying universal and absolute values), although this concept is commonly associated with the classical and Christian heritage of Europe, and might propose a concept of universal human culture with absolute and universal human rights of the sort for which he has a humanistic preference. An adequate theory of human rights must, however, avoid that dogmatism and must take sufficient account of the cultural relativity of men living in different cultural systems. This does not at all mean that people living in different cultures now fall beyond the scope of our concern for human rights, thereby nullifying the international aspect of the human rights movement. On the contrary, all people continue to be the subject of what Edmund Cahn so elegantly described as the sense of injustice in an indissociable blend of reason and empathy.⁴⁰ What it does mean is that an American, who is accustomed to marriage between consenting spouses, cannot, without being dogmatic, insist upon the abolition of arranged marriages, in the village of Daryabad in India, for example; this is especially so when the record of his own culture is just about as unsuccessful as that of Daryabad in achieving marital bliss by reason of the particular way of getting espoused.⁴¹ A sound theory of human rights must accommodate cultural relativity, not ignore it.⁴²

KROEBER & C. KLUCKHOHN, *CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS* (1952); R. MACIVER, *SOCIETY: ITS STRUCTURE AND CHANGES* (1931); R. WILLIAMS, *CULTURE AND SOCIETY* (1958).

⁴⁰ E. CAHN, *THE SENSE OF INJUSTICE, AN ANTHROPOCENTRIC VIEW OF LAW* 22-27 (1949).

⁴¹ Cf. Article 16(2) of the Universal Declaration of Human Rights, *supra* note 3.

⁴² I am here not endorsing Adda Bozeman's thesis that cultural differences among the West, the Islamic Middle East, Africa south of the Sahara, India and Indianized Asia, and China would frustrate international law, that "[i]n an epoch . . . in which national and international politics are governed by ideology, law must be expected to recede from the fields of consciousness and perception, all the more so as it had never been developed as a set of separate normative and symbolic references in traditional Asian and African societies." A. BOZEMAN, *THE FUTURE OF LAW IN A MULTICULTURAL WORLD*, 183 (1971). As I see it, the interests which join the states in the field of international law in general are not culturally particularized, e.g., deter-

G. Ideological Relativity

Destutt de Tracy was not the first person to use the concept of ideology, but when he coined the word *idéologie* in 1796 he had hoped that his science of ideas would lead to institutional reforms in France, as Bentham's ideas (1748-1832) had done in England. The *idéologues* had a measure of success in the *Deuxième Classe* (moral and political sciences of the *Institut National*) until Napoleon Bonaparte abolished the *Deuxième Classe* in 1802-1803, ridiculing the *idéologues* as impractical visionaries.⁴³ Karl Marx (1818-1883) adopted the Napoleonic contempt of ideology and used the term to signify a false consciousness of social and economic realities. He regarded it as a collective illusion shared by the members of a given social class and distinctively associated with that class in history.⁴⁴ Karl Mannheim even inflated it into an all-embracing doctrine of historical and cultural relativism.⁴⁵ In current usage, ideology denotes beliefs and ideas which commit their adherents to actions,⁴⁶ a body of ideas accepted by individuals or peoples.⁴⁷ It has connotations of emotional and intellectual commitment, of action orientation, and of conscious or unconscious marshalling of facts to fit a preestablished doctrine. It furnishes its adherents with a self-definition, as well as a set of deducible imperatives. An

mination and protection of territories, jurisdiction, international agreements, international claims, diplomatic intercourse, regulation of activities in the sea, use of force, and so on. However, in the area of human rights the very matter of concern is the treatment of the individual in the particular society where he lives and, therefore, particularized cultural considerations become quite relevant. Although I do not believe, as she does, that "[p]resent efforts aiming at an extension of international law to the sphere of individual life by drafting, for example, universally valid covenants of human rights, appear in this perspective to be exercises in futility. . . ." *id.*, I do believe that cultural relativity does offer a challenge to any theory of human rights on the international plane.

⁴³ See F. PICAVET, *LES IDÉOLOGUES* (1891).

⁴⁴ Marx's theory of ideology is found in K. MARX & F. ENGELS, *THE GERMAN IDEOLOGY* (written 1845-1846; published 1932). See also Marx's preface to *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (1859); F. ENGELS, *LUDWIG FEUERBACH AND THE OUTCOME OF CLASSICAL GERMAN PHILOSOPHY* esp. chs. 3 and 4 (1888).

⁴⁵ K. MANNHEIM, *IDEOLOGY AND UTOPIA* (1936). See Mannheim's criticism in K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* ch. 23 (5th ed. rev. 1966).

⁴⁶ See S.P. SINHA, *NEW NATIONS AND THE LAW OF NATIONS*, ch. 3: *Ideological Perspectives of the Asian and African States* 53, esp. n.1 (1967).

⁴⁷ Aron, *The Diffusion of Ideologies*, in *POLITICAL THOUGHT SINCE WORLD WAR II* 4 (W. Stankiewicz ed. 1964).

adequate theory of human rights must accommodate the ideological relativity.

The correct model is not that human rights be grounded in an ideological homogeneity that would bridge the gap between the conflicting ideologies,⁴⁸ but that they be realized within the ideological pluralism. Take, for analysis, communist ideology, with all its variations, and Western democracy, with all its variations. The two systems fulfill the human needs of their adherents in two fundamentally different ways. For example, one proceeds on the basis of acceptance of private property in the productive apparatus of the economy, the other on the basis of state ownership of this apparatus. A theory of human rights cannot force the private property of the former upon the economic ideology of the latter as a fundamental human right without being dogmatic. It must not force one ideology upon the other.⁴⁹ Rather, it must strive for the minimization of injustice to the individuals within the conceptual framework of their respective ideological models. Nor can that theory validly proceed upon the presumption that one ideology or the other is totally inconsistent with the demands of human rights.⁵⁰

⁴⁸ Professor Murphy suggests this model. Murphy, *Ideological Interpretations of Human Rights*, 21 DE PAUL L. REV. 286 (1971-72). For a different approach, see Vasak, *Le droit international des droits de l'homme*, 140 RECUEIL DES COURS 332, 404 (1974). See, in this connection, LE DROIT D'ÊTRE UN HOMME, Unesco (1968) (prepared under the direction of J. Hersch).

⁴⁹ Cf. Article 17(1) of the Universal Declaration, *supra* note 3: "Everyone has the right to own property alone as well as in association with others."

⁵⁰ As Professor Berman points out,

[t]he striking fact is that in the protection of human rights, the Soviet system is strong where ours is weak, just as it is weak where ours is strong. There is a very high degree of job security in the Soviet Union. Medical services are freely available to all. Higher education is also freely available to all, on the basis of entrance examinations—indeed, students at higher educational institutions receive stipends from the State. Legal services are inexpensive, and court procedure is speedy. There is a high degree of equality in the treatment of the many different ethnic groups that make up the Soviet Union. Under the 1960 Criminal Code of the Russian Republic (the largest of the 15 republics that make up the Soviet Union), making statements in order to arouse racial hostility or dissension, or directly or indirectly restricting the rights of citizens on the ground of race is punishable by deprivation of freedom for a term of six months to three years or by deportation for a term of two to five years (Article 74). There is also a high degree of equality between men and women. Women receive equal pay with men for equal work, and they comprise a substantial percentage of all the major professions (including about one-third of the legal profession and about three-fourths of

H. *Economic Relativity*

Human rights, in the two aspects discussed earlier, make demands upon the economic and institutional resources of the state. Since states vary in their economic capacity and technological capability, a theory of human rights must take into account this economic relativity.

So far we have examined the requirements which an adequate theory of human rights must fulfill. Now we shall examine the theories advanced to support human rights.

III. THE THEORIES

Human rights primarily have been justified on the basis of natural law, the being of man as man, the equality of man, and social utility.

A. *Natural Law*

Natural law theories are various. They may be classified as follows:

1. The early perceptions of natural law:

- (a) Natural law as law of virtue:
 - (i) *Dharma* (India, Vedic Period: 1500 B.C. - 500 B.C.).⁵¹
 - (ii) Lāo-Tsze (China, b.604 B.C.).⁵²
 - (iii) Confucius (China, b.550 or 551 B.C. - 478 B.C.).⁵³
- (b) Natural law as justice by nature: Aristotle (Greece, 385 or 384 B.C. - 322 B.C.).⁵⁴

the medical profession); the 1960 Criminal Code makes it a punishable offense to violate a woman's equal rights by force or threat of force (Article 134). Finally, I would stress that although legal protection against abuses of human rights by the central authorities is extremely weak under the Soviet system, since the central leadership has complete de facto control over the legislature, there is nevertheless a quite effective system of protection against abuses of human rights by legal authorities where such abuses are in violation of the centrally determined law and policy.

Berman, *supra* note 27, at 334-35. It is also true, as Professor Berman has himself pointed out, that there is "an autocratic central authority that has often been ruthless in crushing human rights," which has, nevertheless, "established an effective system of control over abuses of human rights by intermediate administrative officials." *Id.* at 339-40. This apparent paradox is explained by Professor Berman in terms of a parental concept of law that characterizes the Soviet legal system.

⁵¹ See sources cited in note 14 *supra*.

⁵² See A. WALEY, *supra* note 15.

⁵³ See ANALECTS, *supra* note 16.

⁵⁴ ARISTOTLE, *ETHICA NICOMACHEA* (W. Ross trans.) Book V, 1129b, 1132a, 1134b, 1135a, 1137b, in 9 *THE WORKS OF ARISTOTLE* (1969).

- (c) Natural law as law of right reason: Cicero (Rome, 106 B.C. - 43 B.C.).⁵⁵
 - (d) Natural law as law of God: Aquinas (1225-1274).⁵⁶
2. The modern perceptions of natural law:
- (a) Natural law as objectively given (donné) value: Géný (1861-1944).⁵⁷
 - (b) Natural law as morals: Dabin (b.1889).⁵⁸
 - (c) Natural law as deontology: d'Entrèves (b.1902).⁵⁹
 - (d) Natural law related to sociology: Selznick (b.1919).⁶⁰
 - (e) Natural law based on anthropology: Mead (b.1901);⁶¹ Edel (b.1909) and Edel (b.1908).⁶²
 - (f) Natural law as ethical jurisprudence: Cohen (1880-1947).⁶³
 - (g) Natural law as a relationship between moral truths and general facts: Brown (b.1916).⁶⁴
 - (h) Natural law as relativity of rights and restraints: Chroust (b.1907).⁶⁵

⁵⁵ MARCUS TULLIUS CICERO, *DE RE PUBLICA; DE LEGIBUS*, *De Re Publica*, Book III, XXII, 211; *De Re Legibus*, Book I, V, 315-17, VI, 317-19, XV, 343-45, XVI, 345-47, XVIII, 349-51; Book II, IV, 379-83, V, 383-87 (C. Keyes trans. 1952).

⁵⁶ 8 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part II (First Part), Third Number, Questions XC, XCI, XCIV (Fathers of the English Dominican Province trans. 1942).

⁵⁷ F. GÉNY, *MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* 365-75, XXI-XXXIII (Louisiana State Law Institute trans., nos. 160-62, 2d ed. 1963).

⁵⁸ Dabin, *Théorie générale du droit* (1944) (trans. as *General Theory of Law* by K. Wilk), in 4 20TH CENTURY LEGAL PHILOSOPHY SERIES: *THE LEGAL PHILOSOPHY OF LASK, RADBRUCH AND DABIN* 234, 232-336, 416-18, 419-21, 422-31 (1950).

⁵⁹ A. d'Entrèves, *The Case for Natural Law Re-examined*, 1 *NATURAL L.F.* 5, 28-49 (1956).

⁶⁰ Selznick, *Sociology and Natural Law*, 6 *NATURAL L.F.* 84, 99-108 (1961).

⁶¹ Mead, *Some Anthropological Considerations Concerning Natural Law*, 6 *NATURAL L.F.* 51, 51-54, 64 (1961).

⁶² M. EDEL & A. EDEL, *ANTHROPOLOGY AND ETHICS* 19-33, 77-85, 130-31, 231-32 (rev. ed. 1968).

⁶³ M. COHEN, *REASON AND NATURE* 401-29, 446-49 (1953); and *LAW AND THE SOCIAL ORDER* (1933).

⁶⁴ Brown, *Huntsmen, What Quarry?*, in *LAW AND PHILOSOPHY, A SYMPOSIUM* 177, 179-85 (S. Hook ed. 1964).

⁶⁵ Chroust, *Natural Law and Legal Positivism*, 13 *OHIO ST. L.J.* 178, 178-86 (1952).

- (i) Natural law as the inner morality of law: Fuller (b.1902).⁶⁶
- (j) Natural law as a sense of injustice: Cahn (1906-1964).⁶⁷
- (k) Natural law as objective juridical values: Recaséns-Siches (b.1903).⁶⁸

Human rights theories have, for the most part, used the classical absolutist conception of natural law to justify these rights,⁶⁹ although a relativist position is emerging among some recent justifications of human rights.⁷⁰ The classical formulations of natural law harnessed for this purpose have included the legal philosophies of the Greeks (e.g., Aristotle), the Stoics (e.g., Cicero), and the Christian theologians (e.g., Aquinas). Aristotle taught that there really is a natural justice that is binding on all men, even on those who have no association or covenant with each other. Cicero argued that true law is right reason in agreement with nature, which is universally applicable, unchanging, and everlasting, which can not be repealed, or abolished, which is valid for all nations and all times, and from whose obligations we cannot be freed by senate or people. God, he declared, is the author of this law, its promulgator, and its enforcing judge. Aquinas showed that natural law derived from the law of God. He argued that since the world is ruled by divine providence, the entire community of the universe is governed by divine reason. The whole of divine law is not accessible to man. The intelligible part reveals itself through eternal law, which incorporates divine wisdom. Natural law is that part of divine law which reveals itself in natural reason. Human law is derived from the principles of eternal law as revealed in natural law. God's eternal reason finds its written exposition in divine laws (in the Christian scriptures)

⁶⁶ L. FULLER, *THE MORALITY OF LAW* 5-6, 9-13, 38-44, 96-97, 184-86 (1969).

⁶⁷ E. CAHN, *supra* note 40, at 1-2, 11-14, 22-27.

⁶⁸ Recaséns Siches, *Human Life, Society and Law: Fundamentals of the Philosophy of the Law* (G. Ireland trans.), in 3 20TH CENTURY LEGAL PHILOSOPHY SERIES: LATIN-AMERICAN LEGAL PHILOSOPHY 18-27, 38-39, 118-24, 319-21 (1948).

⁶⁹ E.g., J. LOCKE (1632-1704), *A LETTER CONCERNING TOLERATION* (1689), and *TWO TREATISES ON GOVERNMENT* (1690). Locke's theory of natural rights has been adopted in various historical documents concerning human rights, e.g., *Bill of Rights* (1689), *Declaration of Rights* (Virginia 1776), *Declaration of Independence* (U.S. 1776), *Déclaration des droits de l'homme et du Citoyen* (1789).

⁷⁰ E.g., Castberg, *Natural Law and Human Rights*, 1 *REVUE DES DROITS DE L'HOMME* 14 (1968). Cf. Machan, *Human Rights: Some Points of Clarification*, 5 *J. CRITICAL ANALYSIS* 30 (1975); and Machan, *supra* note 38. See also Rimanque *Human Rights*, 7 *WORLD JUSTICE* 170, 190 ff. (1965-66).

and unwritten exposition in natural law. It is a characteristic feature of classical natural law theory that certain norms for human conduct are right regardless of whether they coincide with positive law, that they are right even for those who do not accept them, and that they are not scientifically verifiable, so that they derive either from religious articles of faith or from primary postulates of reason.

The use of natural law theory is unsatisfactory for thinking about the norms of human conduct for several reasons:

(1) There is an arbitrariness in a theory which insulates itself against the possibility of verification and makes itself unavailable to being disproved, thereby exempting itself from rational argumentation. Its source is God, or absolute reason, or some other comparable metaphysics.

(2) The theory is predicated upon a belief in either the innermost being of man and things or even outright belief in God. Such beliefs are not as generally held as their adherents would like to believe. It is instructive to note that in the deliberations that accompanied the drafting of the Universal Declaration of Human Rights, the proposals to put human rights under the protection of the Divinity or even to affirm the divine origin of man were rejected.⁷¹

⁷¹ At the second session of the Human Rights Commission, Lebanon proposed, in connection with the article dealing with the family, the inclusion of language stating that these rights were granted by the Creator. It was inspired to do so by the Human Rights Declaration of the National Catholic Welfare Conference of America. It argued that the family was a creation of God and that He granted it certain inalienable rights. However, the Soviet Union argued against this inclusion, pointing out that different forms of marriage and family life exist in the world, corresponding to the particular economic conditions of different peoples, that different religions have different ideas as to the place of woman in the family, and that much of the world does not believe in God, whereas the Declaration was meant for all humanity. Chile, China, India, Lebanon, Panama, and the Philippines voted for the Lebanese proposal. Belgium, Byelorussia, France, the United States, the United Kingdom, the Ukraine, the U.S.S.R., Uruguay, and Yugoslavia voted against it. Australia, Egypt, and Iran abstained.

At the second session of the Drafting Committee, Lebanon again made its pitch, arguing that the proposal did not offend the doctrine of separation of church and state (as had been argued by Uruguay at the session mentioned above), and that the Creator is not necessarily God, since it could be Nature under certain philosophies. The Soviet Union questioned the wisdom of introducing philosophical elements in the Declaration. The United Kingdom expressed sympathy for the Lebanese viewpoint, but suggested that Lebanon offer its amendment in the first articles of the Declaration

(3) Since a natural right is discovered by insight, intuition, or evident contemplation, so that there is no criterion of truth other than faith, it is necessarily subject to any interpretation that insight, intuition, or evident contemplation might prompt. For example, nature and God have as much justified slavery in Plato, Aristotle, or the Southern States of America as they have justified equality in Sophistes or Rousseau; they have as much justified Hobbes' absolute power as Rousseau's absolute democracy; they have as much justified

which embodied some philosophical considerations. The amendment was rejected. *See* U.N. DOCS. E/CN.4/SR 37, at 13-15 (1948); CN.4/AC.1/SR 38, at 7-9 (1948).

In the Third Committee of the General Assembly, Brazil proposed an amendment to Article I (U.N. Doc. A/C.3/215 (1948)) stating that man was created in the image and likeness of God and only thus was he granted reason and conscience. Belgium pointed out the delicate nature of this amendment and suggested that even the words "by nature" ought to be dropped from the original text. Cuba agreed, suggesting that the issue was not whether nature or God is the source of reason and conscience. China approved of the deletion of "by nature" in order to avoid resolving a theological question which had no place in a Declaration intended for universal application. Uruguay argued that the relations among men are determined not only by juridical norms but also by the principles of social and moral order, and that as to the latter a common denominator for the entire world has not yet been found. Argentina supported the Brazilian amendment, arguing that it is a common belief in all nations that man was created in the image and likeness of God, that there is no opposition between religion and politics, and that religion gives man the inspiration to follow the ways of peace. The U.S.S.R. warned that an attempt to impose one nation's faith on others would amount to a return to the era of the crusades, that the Declaration must not contain theological affirmations, given the separation of church and state in numerous countries, and that the Declaration must not resolve questions meant to be resolved by each individual for himself, which indeed is one of the rights granted by the Declaration in the form of the freedom of conscience. Colombia argued that the separation of church and state is not inconsistent with the meaning of God. Bolivia argued that God is a positive reality, not a subject of discussion. The United Kingdom and India suggested withdrawal of the Brazilian amendment, since it made a declaration of faith not accepted by all. France, too, suggested the withdrawal of the amendment, arguing that it is best not to settle the question of the origins of man but to arrive at fundamental principles which could be put into practice by both believers and non-believers. The Netherlands made the same suggestion of withdrawal in light of the difficulties raised by the amendment. Finally, Brazil withdrew its amendment. Proceedings of the Third Committee, 90-126, U.N. Doc. A/C.3/SR 95-100 (1948).

The Netherlands offered an amendment to the preamble to the effect that equal and inalienable rights are based on the divine origin and immortal destiny of man, arguing that this would give satisfaction to the majority of the world's population and, while it would be devoid of sense for non-believers, it would not hurt them. Poland argued that it is extremely dangerous to make the Declaration only partially ap-

the establishment (Aquinas) as the revolution (Rousseau).⁷² One might explain, as did Aquinas, that reason can be led astray by passion. But then we come back to the problem of how to decide whether Aristotle's justification of slavery was an example of reason, or an example of reason led astray by passion. Faith cannot be a justification of its own self, unless one believes that faith is indeed a justification of itself.

(4) There is something intellectually disturbing, although psychically comforting, in accepting a natural right just because God meant it to be so or because right reason revealed it to be so in nature in an *a priori* fashion, without scrutinizing the pretended claim. One might question whether, for example, it fulfills the individual's needs under his circumstances, whether it contributes to attainment of justice in his setting, or whether it is even relevant to the circumstances of his living.

(5) There are conceptual difficulties in this theory as to both the nature of nature and the normative consequences to be drawn from that which is found natural. Is nature physical nature in general, or is it man's biological nature? And, then, is that which is found natural in either of these models to be held as the paradigm of order from which ethical imperatives must be deduced, or to be held as limitations upon man's capability within which he must build his normative structure?

pliable, excluding atheists from its scope. The U.S.S.R. reminded that the question of the divine origin of man was debated in Paris in 1789 and the Declaration then adopted did not contain any allusion to this question. Belgium responded that the American Declaration of Independence contained the words "endowed by their Creator" and found it inconceivable that the Third Committee could resolve the question by a vote. France felt that way, too. Byelorussia, France, the Ukraine, India, the United Kingdom, and Chile opposed the amendment because of its controversial nature. Finally, the Netherlands chose not to insist that it be put to vote. Proceedings of the Third Committee, 754-78, U.N. Doc. A/C.3/SR 64-66 (1948). See also A. VERDOODT, *supra* note 10, at 275-81.

⁷² It is interesting to note that while Hegel admitted a concept of rights, he turned Locke's theory upside down by maintaining that rights belonged to societies or communities, not individuals. The Declaration of Rights proclaimed by the nationalist German liberals in 1848 followed the Hegelian concept by speaking of the rights of the German people, not the rights of man as asserted by the American and French Declarations following Locke. See M. CRANSTON, *WHAT ARE HUMAN RIGHTS?* 5 (1962).

(6) Matters of norms are moral determinations or value judgments. They cannot be made simply by observing either the facts of nature in general or the facts of human nature.⁷³ Manmade moral evaluations are inserted into natural law enthymematically when that law is set up as a major premise from which are derived the conclusions about normative imperatives. When natural law produces moral imperatives, it is because premises for those imperatives have already been infused into it.

(7) This theory ascribes to that which is natural the characteristics of being innate, universal, and immutable.⁷⁴ Now, that which is perceived natural has often proceeded on conflicting interpretations. For example, Locke regards man in his natural state as someone seeking the good of others as well as his own and derives his theory of government from that perception, whereas Hobbes finds men in the state of nature at each other's throat and derives his own theory of government from that perception. Since both conceptions are claimed to be innate, universal, and immutable, the choice between them has to be made. The theory under discussion is not equipped to cope with the problem of this choice. That choice is made totally arbitrarily.

(8) Cultural anthropology has taught us that human nature, if it at all exists apart from culture, has manifested itself in different cultural patterns. There are different ways of life in the world. A theory which proceeds from universal, immutable, *a priori* postulates must either ignore the plurality of cultural manifestations of human nature, or dismiss those

⁷³ Cf. Sinha, *The Fission and Fusion of Is-Ought in Legal Philosophy*, 21 VILL. L. REV. 839 (1976).

⁷⁴ In the recently discovered *ESSAYS ON THE LAW OF NATURE* (W. von Leydon ed. 1954), Locke argues that since scientific study of the universe has shown that laws operate throughout nature, it follows that these must be laws governing human conduct, and since laws are universally operative it follows that natural law exists. However, his argument lacks persuasion. There is an essential difference between scientific laws and moral laws. A scientific law states an observed regularity in nature. Therefore it is predictive, not something that can be obeyed or disobeyed at will. If occurrences contrary to it happen, it ceases to be law. On the other hand, a moral law or a law of human conduct can be obeyed or not, and it does not cease to exist upon its breach. For an analysis of the scientific method, see E. NAGEL, *THE STRUCTURE OF SCIENCE* (1961).

manifestations as aberrations to the extent they are discordant with these *a priori* postulates. This is hardly a satisfactory way of going about achieving human rights or justice for the individual who does, in fact, live in his particular culture. For the procedure which this approach follows is either the ignoring of his culture or the dismissing of it as an aberration.

(9) The natural law theory of human rights under examination distorts the historicity of man and his human rights discussed earlier. Since these rights are considered innate in nature under this theory, their historicity becomes merely a progressive manifestation, evolution, or unfolding of that innate essence which was intrinsically present at the outset of the historical process. The formal structure of this process is provided by the historical time, and the law of its manifestation is provided by a principle of necessity in history. Since the essence itself is the ordering of its manifestation this internal structure of essence must of necessity be reproduced in the structure of historical time. This kind of approach to human rights has dangerous consequences. First, it breeds a deterministic account of history, ignoring its contingent aspects, and puts a fatalistic damper on any effort today of doing something about the realization of human rights. Second, it breeds the assumption of autonomy of the developmental process of human rights which is determined only by its internal law, whereas the facts of history glare into our face, screaming that human rights, both in the emergence of the norm and in the specification of the norm, have been conditioned by the social relations and the institutional forms of these relations which have existed from time to time. These rights exist not in the absolute independence of historicity, but in the context of historical times which, in today's context, would include the state forms of social organization, the impersonality of industrialization, the particular technology available in our time, the particular welfare expectations from the state that exist in the individual, the particular kinds of needs that are experienced by the individual, and so on. These conditions are not merely non-causative incidentals which provide a stage for the unfolding of an autonomous system of human rights. Rather, they are conditions which participate in producing not only the norm but the specific catalog of such rights as well. This is not to suggest

that human rights at various historical times have no universal connection at all. The limits of this paper do not permit an excursion into the historiography of human rights.⁷⁵ However, my contention here is that it is a mistake to look at that history as an unfolding of an autonomous system.

(10) It is not necessary for human rights to have a metaethics. The natural law theories of human rights have both metaethical and normative components which are inextricably intertwined under these theories. That is to say, they ontologically describe moral concepts in the metaethical component, they prescribe modes of conduct in the normative component, and they maintain that the former is necessary for the latter. However, I do not see any logical necessity between the two.⁷⁶ It is quite possible to accept norms without accepting their metaethical description. It is also possible to develop significant conditions of human rights claims⁷⁷ without having to resort to metaethics.⁷⁸ This, of course, does not mean that a "simpl[e] . . . straightforward pragmatic justification or vindication"⁷⁹ is enough, or that there is no need for a theory justifying human rights. However, it is possible to separate the metaethical from the normative.

B. *The Being of Man as Man*

Human rights are sometimes justified on the basis of the fact that man is man. It is said that each individual shares in the law of nature

⁷⁵ One fascinating thesis is that this history is to be explained neither in terms of the evolution of an essence nor the concatenation of constituent moments, but in terms of the anticipatory action of a *telos*. See Ladrière, *Human Rights and Historicity*, 10 WORLD JUSTICE 147 (1968-69).

⁷⁶ Cf. Frankena's statement that "it would be substantially correct to say that the concept of human rights is the doctrine of natural rights without its metaethics." Frankena, *The Concept of Universal Human Rights*, in 1 AM. PHILOSOPHICAL A. (E. DIV.), SCIENCE, LANGUAGE, AND HUMAN RIGHTS 189, 192-93 (1952). See also in this connection, the problems raised by Macdonald, *Natural Rights*, 47 PROC. ARISTOTELIAN SOC'Y 225 (1946-47), reprinted in HUMAN RIGHTS 40 (A. Melden ed. 1970).

⁷⁷ As suggested in Melden, *The Concept of Universal Human Rights*, in 1 AM. PHILOSOPHICAL A. (E. DIV.), SCIENCE, LANGUAGE, AND HUMAN RIGHTS 167 (1952); Golding, *Towards a Theory of Human Rights*, 52 MONIST 521 (1968).

⁷⁸ On a debate on whether human rights are metaethically neutral, compare Machan, *supra* note 70, with Blackstone, *Equality and Human Rights*, 52 MONIST 616 (1968).

⁷⁹ Advanced, for example, by Blackstone, *supra* note 78, at 631.

just because he is a human being,⁸⁰ that human rights are owed to man because of the very fact that he is man,⁸¹ that human rights arise because man has rationality and capability of free choice.⁸²

There are difficulties in accepting this theory as a basis for human rights. To begin with, if it is a re-invocation of the natural law theory, discussed above, it suffers from the shortcomings of that theory. Moreover, a human being is not a natural being. He is part of nature only to the extent that he is actual to himself, but he does not regard himself as identical with his natural being, so that his being waits on him to give it meaning. Since he is not a natural being, he cannot constitute that which is natural, from which natural law theory derives its imperatives for human conduct. Furthermore, human nature is not a specific quality or a set of qualities which all men possess. Rather, it is simply a potentiality for a certain range of qualities and activities given to him by his potentiality for reasoning and his perceptual apparatus. From the fact that he has this range of qualities and activities, and not the qualities themselves, nothing that is normative, such as human rights, follows. Again, anthropological learning has alerted us to the fact that there are too many variations in particular norms in different societies of men, so that the possibility of deriving any workable norms from man's animal nature becomes a very unpromising proposition.⁸³ Finally, the suggestion that human rights arise because man has rationality and capability of free choice seems to indicate that the essence of man is self-determination or having the course of his life in his own hands. However, this is an ideal or a morally preferable way of life in some cultures,⁸⁴ but not the empirical essence of man. From the

⁸⁰ H. GROTIUS, 1 DE JURE BELLI AC PACIS, LIBRI TRES 1, 4 (F. Kelsey trans. 1925).

⁸¹ The human person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as such. The dignity of the human person? The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to man because of the very fact that he is man.

J. MARITAIN, *THE RIGHTS OF MAN AND NATURAL LAW* 65 (D. Anson trans. 1943).

⁸² Machan, *supra* note 38, at 227-32; Machan, *supra* note 70, at 33-35.

⁸³ See S. BENN & R. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* (1965); Nielsen, *On Taking Human Nature as the Basis of Morality—An Exercise in Linguistic Analysis*, 29 SOC. RESEARCH 157 (1962).

⁸⁴ Reinhardt quotes a Moslem proverb in this context which says: "A man who has a bad destiny is lucky; he needs only to be thankful. But a man who has a good

fact of being man it does not follow that it is human to determine the course of your own life and inhuman not to do so.⁸⁵ No moral imperatives follow from the being of man as man; consequently, human rights cannot be based upon that mere fact.

C. *The Equality of Man*

Claims about equality can be both prescriptive and descriptive. The prescriptive claim is used when it is argued that equality should be one of the specific human rights. But it is in the descriptive claim that it is argued that equality is that factual characteristic which all men have in common, and which, consequently, constitutes the basis for human rights. The human worth of all persons, as distinguished from their merit,⁸⁶ is claimed to be equal. It continues to be equal even though their merit is unequal. Well-being and freedom are unique and unrepeatable aspects of the individual's existence, it is argued, and they are worth the same to each one. Where individuals are capable of enjoying the same goods, the intrinsic value of their enjoyment is the same, so that one man's well-being, as well as his freedom, is as valuable as any other's. This equal worth of happiness and freedom is, therefore, suggested as the foundation for human rights.⁸⁷

destiny is unlucky, for he may think he has had something to do with it." Reinhardt, *Comments on Professor Machan's Address*, 52 PERSONALIST 346, 348 (1971).

⁸⁵ As Kamenka puts it, "There is nothing to show logically, without moral assumptions, that it is 'human' to act and 'inhuman' to be acted upon or even to be treated as means or object; it is not 'contrary to human nature' to make oneself a beast of burden, an object of pleasure or part of the rat-race. Men and women have done so for many generations; to say that in doing so they have behaved as though they were not human is to load the term 'human' with a moral content that cannot be deduced from its empirical denotation." E. KAMENKA, *MARXISM AND ETHICS* 26-27 (1969). Reinhardt gives an example of the slave of willing consent to highlight the point. He points out that "[o]ne might say of the slave of willing consent that he ceased to 'be a man.' But this use of 'be a man' is dependent on its use in the imperative 'Be a man!,' and that imperative is patently expressive of an ideal. Moreover you cannot address such an imperative to anything other than what obviously is a man already." Reinhardt, *supra* note 84, at 350.

⁸⁶ Merit in this argument means "all the kinds of valuable qualities or performances in respect of which persons may be graded," provided only they are "acquired," *i.e.*, represent what their possessor has himself made of his natural endowments and environmental opportunities. Vlastos, *Justice and Equality*, in *SOCIAL JUSTICE* 31, 43 (R. Brandt ed. 1962).

⁸⁷ *Id.* See also Wasserstrom, *Rights, Human Rights, and Racial Discrimination*, 61 J. PHILOSOPHY 628 (1964).

The first difficulty with this thesis is the question whether each person's intrinsic value of his well-being and freedom is indeed the same as, or equal to, any other's. An answer proposed to this criticism is that since the denial of the opportunity to experience the enjoyment of goods enjoyable by all results in denial of a full and satisfying life, it must be the case that their intrinsic values are equal for all human beings.⁸⁸ While I do feel that there is something objectionable about denying an individual the enjoyment of these goods, I fail to see how that fact shows that their intrinsic values are equal for all persons. Secondly, the alternative suggested by the proponents of this theory is not satisfactory either. It is suggested that, conceding differences in these values, these differences are not discoverable or measurable and, therefore, this impossibility of determining differences is a good basis for human rights.⁸⁹ This argument appeals to us to opt for equality. But, then, this becomes merely an article of faith or an intuitive preference for the egalitarian morality as opposed, for example, to Nietzsche's master morality.⁹⁰ My preference for one of the alternative moral codes does not prove that it is superior to others.⁹¹

D. *Social Utility*

Jeremy Bentham (1748-1832), the founder of the utilitarian philosophy, said that "[n]ature has placed man under the empire of pleasure and pain," and that "[t]he principle of utility subjects everything to these two motives."⁹² Utility expresses "the property or tendency of a thing to prevent some evil or to procure some good" and "[t]hat which is conformable to the utility or the interest of an individual is what tends to augment the total sum of his happiness. That which is conformable to the utility or the interests of a community is what tends to augment the total sum of the happiness of the individuals that compose it."⁹³ While Bentham scoffed at justice and similar notions, John Stuart Mill (1806-1873) attempted a synthesis between justice and utility through a sentiment of justice or the individual feeling of right, "[j]ust persons resenting a hurt to society,

⁸⁸ Wasserstrom, *supra* note 87, at 637-38.

⁸⁹ *Id.*

⁹⁰ F. NIETZSCHE, *JENSEITS VON GUT BÖSE* (1886) (trans. by W. Kaufman as *BEYOND GOOD AND EVIL*, esp. 202 ff. (1966)).

⁹¹ For an elaboration of this criticism, see Nielsen, *Scepticism and Human Rights*, 52 *MONIST* 573 (1968).

⁹² J. BENTHAM, *THE THEORY OF LEGISLATION* 2 (C. Ogden ed. 1930).

⁹³ *Id.*

though not otherwise a hurt to themselves, however painful, unless it be of the kind which society has a common interest with them in the repression of."⁹⁴

Social utility has sometimes been suggested as the basis for human rights, so that genuine human rights are those which would increase total happiness or well-being.⁹⁵

Difficulties exist in accepting social utility as the basis for human rights. For one thing, it is a delusion to think that there is a necessary identity between individual happiness and communal happiness.⁹⁶ That delusion oversimplifies the problem of human rights by generating the belief that what augments the happiness of the individuals composing a community is necessarily in the interest of that community. In fact, the very struggle of human rights, to the extent it consists of securing the protection of the individual from excesses of the state, is rooted in the perception by the state that its interests are being threatened by the individual's efforts to maximize his happiness. Secondly, social utility may sometimes be in outright conflict with human rights. It is not hard to imagine cases when the welfare of the whole may be promoted by the sacrifice of a single group, *e.g.*, German Jews or American Indians. This is precisely the kind of social solution against which the human rights movement is directed. Thirdly, the thrust of human rights is to achieve justice for the individual. Justice is not merely a function of the maximization of the welfare of the whole. It is a matter of how the goods and the ills of that whole are distributed among the individual members of that whole. Finally, there are the familiar problems of differing conceptions as to what precisely and specifically constitutes utility with respect to certain goods or value, the difficulty of measuring utility, indeed the very measurability of it, and the uncertainty of the evidentiary basis for any claim that something is a condition of utility.

I have examined the various theories which have primarily been advanced as a basis for human rights. They have included natural law,

⁹⁴ J.S. MILL, UTILITARIANISM 64 (Everyman's ed. 1951) (1st ed. 1863).

⁹⁵ For example, Blake maintains that "the truly natural rights must be those claims, liberties, and privileges the possession of which by the person or persons in question will continue, so long at least as human nature and the laws of the physical universe remain substantially what they now are, to constitute permanent and general conditions of human happiness." Blake, *On Natural Rights*, 36 ETHICS 86, 94 (1925).

⁹⁶ The late Professor Friedmann has shown that this delusion is reflected in some of Bentham's concrete proposals. See W. FRIEDMANN, LEGAL THEORY 318-19 (5th ed. 1967).

the being of man as man, the equality of man, and social utility. In the following section, I shall outline the anthropocentric theory of international law and suggest that theory as a basis for human rights.

IV. THE ANTHROPOCENTRIC THEORY OF INTERNATIONAL LAW

If international law is to maximize its relevance to human affairs or, more explicitly, if it is to play its role in the twin goals of law—providing order and achieving values in the universe in which it operates—it must take on the anthropocentric perspective. Suddenly in recent years, human beings have been catapulted from the state to the entire planet in a very immediate sense, even in such matters as air to breathe, food to eat, and so on. The task of international law, consequently, has become the management of human existence on a planetary scale, no longer limited to its traditional role of providing binding rules for governing relations among states. Therefore, international law and its institutions must now be approached from an anthropocentric point of view.

When we approach the problem in this manner, we are quite obviously looking into the future, and not merely analyzing the data of the past. Recent futurology has addressed itself to the problem of future international legal order. Our attempt here is to avoid the futurological method. That method has, generally speaking, proceeded along three major lines: extrapolation, analogy, and prophecy. The difficulty with extrapolation of present trends is that the trends are changing and, therefore, are of limited assistance in guiding the future. Analogy proceeds on the basis that something has happened previously so it will happen again, usually in single instances. Analogy becomes of limited value, first, because it usually proceeds from single instances and does not adequately comprehend the dynamics of the whole and, secondly, because it is too tied down to that which has happened in the past. Prophecy proceeds from the belief that certain things will happen anyway and, to a large extent, it has been self-fulfilling. So, we have chosen here to avoid the futurological method, and instead, to follow the philosophical, eidetic, and transcendental reductions to which recent phenomenology⁹⁷ has been driving our at-

⁹⁷ Johann Heinrich Lambert first spoke of phenomenology as the theory of illusion. J. LAMBERT, *NEUES ORGANON* (1764). Lambert's contemporary Immanuel Kant termed "phenomena" those objects and events that appear in our experience, as distinguished from "noumena," which are objects and events as they are in themselves,

tention. Philosophical reduction is achieved by bypassing all theories and explanatory concepts about things, thereby returning to the things themselves. Eidetic reduction is achieved by eliminating the factual elements of the objects under investigation so as to perceive their essence (*eidōs*), through discerning their typical structure. Transcendental reduction is achieved by eliminating other objects of consciousness to disclose the thing's consciousness, or intentionality, thereby enabling the consciousness to perceive itself in pure transcendental ego.

Within the limits of the space available here, we cannot carry out a detailed application of our preferred method to the objects of our inquiry. However, let us briefly observe three major objects of our interest: man, international law, and the state.

beyond the forms imposed upon them by our cognitive faculties. Kant argued that man can know only phenomena, not noumena. I. KANT, *CRITIQUE OF PURE REASON* (1781). This theory was disputed by Georg Wilhelm Friedrich Hegel. G. HEGEL, *PHENOMENOLOGY OF THE SPIRIT* (1807). In the mid-nineteenth century, phenomenology denoted a purely descriptive study of any given subject matter. See W. HAMILTON, *LECTURES ON METAPHYSICS* (1858); E. VON HARTMANN, *PHENOMENOLOGY OF MORAL CONSCIOUSNESS* (1878). At the turn of the century, C.S. Pierce extended phenomenology beyond a descriptive study of all that is observed to be real, to include whatever is before the mind, whether it be real, illusory, imaginary, or dreamy. Edmund Husserl, who is regarded as the father of modern phenomenology, used the term in the early years of this century to denote a manner of approaching philosophy. E. HUSSERL, *CARTESIAN MEDITATIONS: AN INTRODUCTION TO PHENOMENOLOGY* (1960); *IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY* (1931); *IDEEN ZU EINEN REINEN PHÄNOMENOLOGISCHEN PHILOSOPHIE, VOL. II: PHÄNOMENOLOGISCHE UNTERSUCHUNGEN ZUR KONSTITUTION; VOL. III: DIE PHÄNOMENOLOGIE UND DIE FUNDAMENTS DER WISSENSCHAFTEN* (M. Biemel ed. 1952); *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY* (1970); *THE IDEA OF PHENOMENOLOGY* (1964); *THE PARIS LECTURES* (1964); *Phenomenology*, in *ENCYCLOPEDIA BRITANNICA* (14th ed. 1927) (new translation by R. Palmer in 2 J. BRIT. SOC'Y FOR PHENOMENOLOGY 77 (1971)). Thus, in the modern parlance of philosophy, phenomenology has become a philosophical method. It indicates two things: (a) a particular method of observation outlined by Husserl; and (b) the development of certain doctrinal themes, or the drawing of ontological, metaphysical, and anthropological consequences by different phenomenologists, including Husserl. P. AMSELEK, *MÉTHODE PHÉNOMÉNOLOGIQUE ET THÉORIE DU DROIT* 86 (1964); E. BREHIER, *HISTORIE DE LA PHILOSOPHIE ALLAMANDE* 182 (3d ed. 1954); H. POS, *PROBLÈMS ACTUELS DE LA PHÉNOMÉNOLOGIE: ACTES DU COLLOQUE INTERNATIONAL DE PHÉNOMÉNOLOGIE* 31 (1951). Phenomenology appears in a variety of ways. It may appear as an objective inquiry into the logic of essences and meanings, as a theory of abstraction, as a psychological description of consciousness, as a speculation on the transcendental ego, as a method of approaching concretely lived existence, or as existentialism itself. For a

A. *Man*

It used to be that man lived in a state rather than on the planet, in the sense that the problem of the satisfaction of his needs, such as breathing air, eating food, drinking water, procreating, protecting his life from crime, disease, starvation, improving his economic condition, and his cultural enrichment, protecting his intangible values of freedoms and liberties, and so on, used to be confined to his state. Now he has been catapulted from his state to the entire planet for his existence in an unprecedented way. Thus, a massive deforestation, say, in Africa, tends to affect the oxygen content of the air that everyone breathes. The international aspects of his food are only too obvious to be pointed out. His procreative activity is of international concern in the control and redistribution of population. Protection of his life from crime, disease, starvation, industrial pollution, and the like are international matters, as is the protection of his life from war. His economic betterment is a matter of international trade, international exploitation and distribution of resources, development of technology and its transfer globally, and so on. Conditions of his work, leisure, and participation in cultural enrichment are international matters. And so are the fulfillment of his intangible values of freedoms, liberties, and the like. From the viewpoint of defining the task for international law and, therefore, the directions in which its subject matter must continue to grow, the anthropocentric needs of planetary existence may be classified as follows:

1. Primary needs:
 - a. Air
 - b. Food

survey of the phenomenology of Husserl, Heidegger, Sartre, and Merleau-Ponty, see P. THÉVANEZ, WHAT IS PHENOMENOLOGY? AND OTHER ESSAYS 37-92 (1961). Several kinds of phenomenology are evident in the work of Husserl himself. See 1 H. SPIEGELBERG, THE PHENOMENOLOGICAL MOVEMENT: A HISTORICAL INTRODUCTION 74-75 (2d ed. 1965). However, the conceptual unity of this philosophical movement results from its method. R. CALLOIS, PANORAMA DES IDÉES CONTEMPORAINES 55 (1951); 1 M. NATANSON, *Phenomenology and the Social Sciences*, in PHENOMENOLOGY AND THE SOCIAL SCIENCES 23-24 (1973); Amselek, *La phénoménologie et le droit*, 17 ARCHIVES DE PHILOSOPHIE DU DROIT 185, 188 (1972) (trans. as *The Phenomenological Description of Law*, in 2 M. NATANSON, *supra*, at 367. According to one observer, the steps of the phenomenological method are: (1) investigating particular phenomena; (2) investigating general essences; (3) apprehending essential relationships among essences; (4) watching modes of appearing; (5) watching the constitution of phenomena in consciousness; (6) suspending belief in the existence of the phenomena; and (7) interpreting the meaning of phenomena. 2 H. SPIEGELBERG, *supra*, at 659.

- c. Water
 - d. Procreation (population control, population redistribution)
 - e. Protection of life from:
 - (i) War
 - (ii) Crime
 - (iii) Disease
 - (iv) Starvation
 - (v) Killers of modern life (transportation, industry)
2. Secondary needs:
- a. Economic betterment (availability, exploitation, and mobility of resources; development of technology and its transfer)
 - b. Cultural enrichment (conditions of work, leisure, and participation in cultural goods)
 - c. Achievement of intangible values (freedoms, liberties)

B. *International Law*

In Roman times, the Roman Custom, *consuetudo communis*, applied throughout the world known to Europe. In the Middle Ages, the emperor gave law to the entire world, the *universus orbis*, and not merely to the occident. With the decline of the emperor's position as the universal lawgiver, particularly from the 12th century onward, rulers began claiming exemption from his authority on legal grounds, such as prescription, ancient custom, privilege granted by the emperor, and even assumption of irregular titles. Such was the spirit of the times in which Bartole wrote that "*civitates non recognoscunt superiorem*" (states do not recognize a higher authority than their own), and Balde declared that "*rex in regno suo est imperator regni*" (the king, in his kingdom, is emperor of that kingdom). In the wake of imperial disintegration, a feudal system of authority emerged in Europe. There appeared a world of warrior, priest, free farmer, serf, and local trader. By the 17th century, Western man, who had colonized the new world and moved eastward in quest of further trade, looked for a new system of authority to control the rich life of this trade and intercourse and found it in the nation-state. At first, the warrior chief had been the sovereign, but the modern state replaced him. Sovereign and impersonal, the state was separate from its prince, separate even from its government. It was a juridical entity by itself. The Peace of Westphalia of 1648, ending the Thirty Years' War, marked the final step in the emergence of the modern system which

carved the world into separate states. Civil law and the law of nature gave these states their juridical foundation; the law of nations gave them the governing principle for relations among themselves. This law, called the law of nations until Jeremy Bentham called it international law in 1789, was carved out of civil law and appeared applicable to interstate relations alone. It was, thus, newly conceived. Then its content had to be developed. After some early flirtations with natural law, it came to be settled that the source of international law was positivist, that this law was valid if it conformed to the actual practice of states, that it was the common consent of the sovereign states that provided its validity. This law, then, delivered the rules regulating interstate relations.

The traditional model of international law has been inadequate for providing the necessary means of control for the social action of world society even under the conditions of the world of 1648, since, although the structure of the world under its system was compartmentalized into independent, sovereign states, the social action of the world could not be so compartmentalized even then. This is more so now, when the increased international interdependence and intercourse have broken down the bounds which had confined international law essentially to the regulation of relations among states. International law has grown in this century into those dimensions which Judge Philip Jessup captured under the caption of transnational law and which Professor Wolfgang Friedmann rationalized by distinguishing the traditional, essentially "horizontal" international law of coexistence from the newer, "vertical" international law of cooperation. And now, with man's existence broken out of the state and catapulted upon the planet the direction is set for an international law of planetary existence. An examination of the existing international law and institutions would indicate a movement of international law already in that direction.

C. *The State*

In recent times, a number of states have sprouted like mushrooms. The proliferation of states is demonstrated in the following table, adapted from an earlier work:⁹⁸

⁹⁸ S.P. SINHA, *supra* note 46, at 25.

EMERGENCE OF THE STATES OF ASIA AND AFRICA ON THE INTERNATIONAL SCENE

Year	Occasion	Number of participating states	Number of Asian-African states participating	Percentage of Asian-African states
1885	Congo Conference of Berlin	14	0	0
1899	First Hague Conference	27	5	19
1907	Second Hague Conference	43	5	12
1920	Formation of the League of Nations	45	6	13
1945	Establishment of the United Nations	51	11	22
1978	Roster of the United Nations	149	91	61

Not only have the states grown in number, but they are engaged also in an intensive pursuit of concentrating military, political, and economic power in their hands. There is no evidence of either the withering away of the national state or its displacement through the transfer of major decision-making powers from the national to the international level. States, large and small, have amply demonstrated their propensity to guard their nationalistic model most fanatically.

Looking at man, international law, and the state in this fashion, we come to the conclusion that the anthropocentric needs of existence in the transformed relationship of man to the world beyond his state have to be met to a crucial extent on the international level. And, yet, the structure of organization for this task cannot be through transferring major decision-making powers from national states to international bodies. Dreams about an international confederation of all states, or the like, are simply unrealistic. The only feasible approach is for international law to take what has been described as the functionalist approach,⁹⁹ thereby bypassing the national state, rather than attempting to overcome it, through organizing internationally the achievement of certain specific values or the fulfillment of certain specific needs.

The anthropocentric theory of international law, therefore, calls for a functionalist approach for that law and its institutions in the fulfillment of the needs of man's planetary existence. The response of

⁹⁹ See, e.g., the various writings of the late and beloved Professor Wolfgang Friedmann.

this law to that calling would determine the issue of its relevance or desuetude to human affairs in the near future.

V. HUMAN RIGHTS LOCATED IN THE ANTHROPOCENTRIC THEORY

This article seeks the basis as well as justification for the international movement for human rights in the anthropocentric theory of international law outlined above. In light of that theory, the human rights imperative¹⁰⁰ becomes the fulfillment of man's needs of his planetary existence with justice. This, at once, provides us with the badly needed separation, though not dichotomy, of the concept from the catalog of human rights. The social world is a pluralistic phenomenon. Different social systems, with their own economic, cultural, and ideological particularity, have different ways of going about achieving the satisfaction of the needs of those who compose their membership. The task of the human rights movement is to see that within the context of these differing systems, that is to say, within these economic, cultural, and ideological particularities, the human rights imperative—justice in fulfillment of man's needs—is satisfied. This, then, would enable us to develop particular catalogs of specific human rights for different social systems. It may be more likely than not, that certain specific rights in these particular catalogs may be similar, or even universal, but then that would be a consequence of the application of the human rights imperative to the different social systems and not, very significantly, an instance of the catalog of one particular society being rammed down the throat of another under the crusading rubric of human rights. It is self-defeating for the human rights movement to take the latter approach and to force American-styled private property upon the Soviet Union or China, or to abolish arranged marriages in Daryabad, India. The present frustrations of the human rights movement are in part due to the confusion of the concept and the catalog.

Not all the battles for human rights will be won merely by adopting the approach suggested in this article, but the human rights movement would, at least, become intellectually sound thereby. This theory of human rights grounds the justification for these rights in necessity, not in pious exhortations, and provides for both the positive and negative aspects of human rights or, in other words, both the protection of the individual and the fulfillment of his needs. It also comports with the historicity of man, allows an order of priority in the fulfill-

¹⁰⁰ Reminiscent of Kant's categorical imperative, but much less dogmatic.

ment of the needs at hand,¹⁰¹ provides for revisability of these rights, accommodates cultural relativity, is compatible with ideological relativity, and is consonant with variability in economic ability and technological capability.

This theory, consequently, avoids the major pitfalls of the other theories as a basis for human rights discussed earlier. Since its tenets issue from the needs of man, it need not rely, as does natural law, on an arbitrary insulation from the possibility of verification. The needs of man are a verifiable fact. Again, it does not depend upon beliefs which are not, in fact, generally held by all peoples, since its basis is the needs which, in fact, are generally experienced by man. Nor does it invoke faith for its criterion of truth. Moreover, its claims are open to scrutiny by empirically grounded questions. It does not fall prey to inscrutable notions, such as nature. Unlike natural law theories, it does provide a principle for choosing one particular claim of a human right over another. Furthermore, it puts the responsibility for moral choices squarely upon those who make those choices, rather than diffusing that responsibility into nature. Similarly, the theory suggested here avoids the difficulties which beset justifying human rights on the being of man as man. It does not reduce the human being to a natural being. Nor does it derive the normative from something as non-normative as the fact of nature. It does not make arbitrary assumptions about the variety of moral preferences which exist in different cultures. Again, the theory argued here avoids the problems attendant upon taking the equal worth of man as a basis for human rights. It is not necessary under our theory to either determine or assume an equality of the intrinsic worth of goods for all persons, both of which are dubious propositions. Finally, the theory proposed here also avoids the pitfalls of utilitarianism as a basis for human rights. It does not accept the utilitarian delusion that individual happiness is identical to communal happiness. Nor does it have to overlook the fact that social utility sometimes may collide outright with human rights. For its imperative is the fulfillment of the needs of man with justice.

¹⁰¹ For example, in the Bangladesh catalog of human rights, food is inarguably prior to freedom of taking trips (travel and movement) to enjoy the natural beauty of the landscape from one end of the country to another, whereas in the United States catalog the prior position of food to stave off starvation would not be the same; and the total abolition of the two rights would be repugnant to both of these catalogs. The separation of concept from catalog under the theory proposed here would preserve this sense of priority.